REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 96 & 132 OF 2008

(From the conviction and sentence by P.T. NDITIKA Senior Resident Magistrate at Kerugoya

in Criminal Cases No. 490 of 2005 on 15th August 2006)

FRANCIS NGARI WANGITHI.....1ST APPELLANT
PETER NJOGU MUGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants in this case had been charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The facts of the Prosecution's case as in the Charge Sheet are as follows:-

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.

1. PETER NJOGU MUGO 2. FRANCIS NGARI WAGITHI

On the 24th day of June 2004 at Defathas Village in Kirinyaga District of Central province, jointly and with another not before court robbed JOSPHAT MURIITHI MAURA one wrist watch and cash KShsl.20,300/= all valued at KShs.20,600/= and at or immediately before or immediately after the time of such Robbery used actual bodily harm to the said JOSPHAT MURIITHI MWAURA.

They pleaded not guilty and after a full hearing the learned trial magistrate convicted them and sentenced them to death. And being aggrieved by that judgment they have filed this appeal raising the following grounds;

1. The trial magistrate erred in law and facts by relying on the evidence of identification without a first report.

2. The trial magistrate erred in law and fact by accepting voice evidence with no voice identification parades.

3. The trial magistrate failed to consider the evidence of PW3 who said there was a conflict between PW1 and Appellants.

4. The trial magistrate relied on the evidence of investigation which was below standard.

5. The trial magistrate erred in law and fact by failing to consider their defences.

The 1st Appellant elected to say nothing in submissions. The 2nd Appellant cited contradictions in the evidence of PW1. The state through the learned state counsel Mr. Wahorosubmitted that they were conceding to the appeal because from the proceedings PW1 maintained that he did not know who stole from him. But he maintains that his watch, bicycle and money got lost. AP Mbura PW3 said he did not hear PW1 say he had lost anything.

This being a 1st Appellate court it is mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent decision***. Ref: NJOROGE VS REPUBLIC [1987] KLR 19.***

We shall therefore consider afresh the evidence before the trial court. The prosecution case was that on 24/6/2004 6.30 p.m., PW1 was going to Defathas where he lived. He was riding his bicycle. He buys and sells tomatoes. On the way he met the two appellants who stopped him but he refused. They then held his bicycle and started beating him with sticks and stones. They followed him up to Kariithi's plot and continued to beat him.

They alleged he had stolen a mobile. They left when police came. PW1 said his watch, Shs.20,300/= got lost. He found his bicycle at home. No mobile was found on him. He went for treatment and was issued with a P3 form (EXB1). He said in cross examination that he did not identify who took his money.

PW2 heard noises and went to check. This was at Defathas. He found PW1 surrounded by people while 3 people were beating him. Police officers came and the Appellants disappeared. PW3 is an Administration police Corporal says on 24/6/2004 6.30 p.m. he was at Defathas AP post when he heard screams. He went and found people surrounding one shop. On inquiry he was told of a person hiding there. He was shown the Appellants and another called Mwedia who were running away. PW1 had been injured on the face and he went away with him. He never heard PW1 say he had lost anything. The Appellants were arrested on 2/2/2005 and 20/1/2005 respectively.

PW4 says he recorded PW1's report where he said he was robbed of a bicycle, 23,000/=, a watch and was beaten by the Appellants and Mwedia. PW5 examined PW1 and confirmed he had been injured. He produced the P3 (EXB.1).

1st Appellant in his unsworn defence denied the charges. He said on 2/5/2005 he went with his partner to a bar and restaurant in Defathas. He ordered for food and beer. He lit a cigarette. A person he did not know came and asked why he was smoking. The person arrested him.

2nd Appellant also unsworn said he did not commit the offence. On 22/1/2005 he was drinking when an officer came. At 8 p.m. they quarreled. The officer returned with another officer. He was traced up to 28/1/2005 when he was taken to court.

In his Judgment the learned trial magistrate says that the issue of identification had been proved beyond reasonable doubt and that was all. He further says the evidence is overwhelming and proceeded to convict after considering the evidence of the Appellants. In our analysis of this evidence we do not find

identification/recognition to have been an issue. The major issue here is the establishment of an offence called Robbery with Violence contrary to Section 295(2) of the Penal Code

Section 295 defines what robbery is:

"Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

The first ingredient of Robbery is therefore the stealing. Was stealing ever established? PW1 said he did not know who stole his things. He was surrounded by many people but those assaulting him were three (3). Even the police officer (PW3) who rescued PW1 said he never heard him say he lost anything. PW4 says he investigated the case and he established that PW1 was robbed by the Appellants and Mwedia. He did not bring the witnesses to establish his findings. The mere fact that PW1 lost certain items in the course of the beating was not proof that it was those beating him who stole them. There is evidence that PW1 was surrounded by many people. Even PW1 himself exonerates them. Why would PW4 want to behave like he was at the scene? The best he should have done was to charge the Appellants with an offence of assault contrary to Section 251 of the Penal Code.

The learned trial magistrate erred in law and fact by failing to establish whether the Appellants did steal anything from the complainant before considering the elements of violence under Section 296(2) of the Penal Code. In this case it was only the assault which was proved and the trial court could have well dealt with the case under Section 179(1) (2) of the Criminal Procedure Code. We cannot do that now because the Appellants have been in prison since 1/8/2005.

We find it unsafe to let the conviction to stand. We allow the Appeal and quash the conviction. The sentence is also set aside.

The Appellants to be released forthwith unless lawfully held under a separate warrant.

DELIVERED, SIGNED AND DATED AT EMBU THIS 10th DAY OF FEBRUARY, 2012.

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H. I. ONG'UDI
JUDGE

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MUGA APONDI
JUDGE
In the presence of:-
Ms. Matiru for state
Appellant in person
Njue CC

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H. I. ONG'UDI
JUDGE

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MUGA APONDI
JUDGE
10TH FEBRUARY, 2012.